Woodsville Sdn Bhd v Tien Ik Enterprise Sdn Bhd & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–438 OF 2000, W–02–457 OF 2000, W–02–458 OF 2000, W–02–459 OF 2000 AND W–02–460 OF 2000

ARIFIN ZAKARIA, MOHD GHAZALI JJCA AND JAMES FOONG J

11 DECEMBER 2004

Companies and Corporations — Winding up — Petition — Consolidated actions — Preliminary objection on notice of appeal — Whether there was consolidation of petitions — Petitioner relied on intitulements of the winding-up order by High Court and subsequent Supreme Court — Whether court merely ordered that removal application by petitioner be heard together with applications for resignations by liquidators

The appellant/petitioner was the common petitioner in the four petitions ('the petitioner'). The High Court ordered the four companies to be wound up ('the Winding-Up Order'). The liquidators were later duly appointed for the four companies. Subsequent thereto, the liquidators applied for leave to resign from the office of liquidators of the four companies. The petitioner in the four petitions in turn applied for the removal of the liquidators. The applications by the liquidators and the petitioner in petitions were ordered to be heard together. The High Court dismissed both the applications by the petitioner and the liquidators. The petitioner and the liquidators appealed against the said decision. When the appeals came up for hearing, the first respondent raised a preliminary objection against the notice of appeal filed herein by the petitioner. It was contended that no consolidation of the four petitions was ever made by to High Court. It was contended that the court had merely ordered that the removal applications made by the petitioner be heard together with the four applications filed by the liquidators for resignations.

Held, dismissing the preliminary objection:

(1) There was no express order of the court for the consolidation of the four petitions. The petitioner had relied on the intitulements of the Winding-Up Order by the High Court and the subsequent Supreme Court judgment on appeal, showing that the four petitions had been consolidated. This was further supported by the judgments of the High Court and the Supreme Court (see para 14). From the judgment of the Supreme Court, the issue of consolidation of the four petitions must have been raised before the Supreme Court otherwise the Supreme Court would not have made the finding as it did. The Supreme Court in its judgment clearly stated that it made the finding based on the notes of proceedings before the court showing that the parties had agreed to the consolidation and for that reason it was no longer open to the parties

to complain about it (see para 16). The intitulements of any judgment will follow the title in the action and if two or more actions had been consolidated then the titles to the actions will state that the actions had been so consolidated (see para 17).

(2) The only way for either of the parties to overcome the earlier order for consolidation is for the parties to apply to the court for a deconsolidation order. This has not been done. In the circumstances the four petitions remained consolidated and should be proceeded with as consolidated actions (see para 20).

[**Bahasa Malaysia summary**

Perayu/pempetisyen adalah pempetisyen yang sama dalam empat petisyen ('pempetisyen itu'). Mahkamah Tinggi memerintahkan empat syarikat itu digulung ('perintah penggulungan itu'). Penyelesai memohon kebenaran untuk meletak jawatannya sebagai penyelesai untuk empat syarikat itu. Pempetisyen dalam empat petisyen itu juga memohon untuk menyingkirkan penyelesai-penyelesai. Permohonan-permohonan oleh penyelesai dan pempetisyen dalam petisyen telah diarahkan didengar bersama. Mahkamah Tinggi menolak kedua-dua permohonan pempetisyen dan penyelesai-penyelesai. Pempetisyen dan penyelesai-penyelesai merayu terhadap keputusan itu. Apabila rayuan-rayuan itu dibicarakan, responden pertama membangkitkan satu bantahan awalan terhadap notis rayuan yang difailkan oleh pempetisyen. Dihujahkan bahawa tiada terdapat pengabungan keempat-empat petisyen itu. Adalah dihujahkan bahawa mahkamah hanya memerintahkan permohonan yang dibuat oleh pempetisyen dibicarakan bersama dengan empat permohonan yang difailkan oleh penyelesai yang meletak jawatan.

Diputuskan, menolak bantahan awalan itu:

(1) Tiada perintah yang jelas dari mahkamah untuk mengabungkan empat petisyen itu. Pempetisyen telah bergantung kepada 'intitulements' perintah penggulungan oleh Mahkamah Tinggi dan keputusan Mahkamah Agung selanjutnya mengenai rayuan yang menunjukkan bahawa empat petisyen itu telah digabungkan. Ini juga disokong oleh keputusan Mahkamah Tinggi dan Mahkamah Agung (lihat perenggan 14). Daripada keputusan Mahkamah Agung, isu penggabungan keempat-keempat petisyen itu telah dibangkitkan di hadapan Mahkamah Agung, jika tidak Mahkamah Agung tidak akan memutuskan seperti yang diputuskan. Mahkamah Agung dalam keputusannya telah jelas menyatakan bahawa penemuan telah dibuat berdasarkan nota-nota prosiding di hadapan mahkamah yang menunjukkan bahawa pihak-pihak telah menyetujui kepada penggabungan itu dan atas sebab itu pihak-pihak tidak dibenarkan untuk mengadu (lihat perenggan 16). 'Intitulements' mana-mana keputusan adalah menurut

tajuk guaman dan sekiranya dua atau lebih guaman telah digabung maka tajuk kepada guaman akan menunjukkan bahawa guaman itu telah digabungkan (lihat perenggan 17).

(2) Satu-satunya cara untuk pihak-pihak mengatasi perintah penggabungan sebelumnya adalah untuk pihak-pihak memohon kepada mahkamah supaya menyahgabungkan perintah itu. Ini tidak dibuat. Dalam keadaan ini, keempat-empat petisyen itu masih digabungkan dan akan diteruskan sebagai satu guaman bergabung (lihat perenggan 20).]

Notes

For cases on winding up of petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152–1219.

Cases referred to

Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (refd)
Lee Lan v Lim Yoon Loy [1991] 3 MLJ 419 (refd)
Lewis v Daily Telegraph (No 2) [1964] 2 MLJ 601 (refd)

Legislation referred to

Evidence Act 1950 s 114(e)
Rules of the Court of Appeal 1994 r 5
Rules of the High Court 1980

Appeal from: Companies Winding Up Nos D2–28–187 of 1990, D2–28–192 of 1990, D2–28–197 of 1990 and D2–28–202 of 1990 (High Court, Kuala Lumpur)

Lim Kian Leong (Ong Chee Kwan with him) (Lee Ong & Kandiah) for the appellant.
Alvin Tang (Claire Skelchy with him) (Shook Lin & Bok) for the second, third, fourth and fifth respondents.
First respondent absent.

Arifin Zakaria JCA (delivering judgment of the court):

[1] These five appeals arose from the decision of the High Court in petitions No D2–28–187 of 1990, D2–28–192 of 1990, D2–28–197 of 1990 and D2–28–202 of 1990.

[2] For the purpose of these appeals the following facts were not disputed. Woodsville Sdn Bhd, the appellant/petitioner in W–02–438 of 2000 is the common petitioner in the four petitions ('the petitioner'). The petitioner is a nominee company of one Kuok Khoon Hwong also known as Peter Kuok. On 9 June 1994, the High Court ordered the four companies to be wound up and at the same time turning down the application of the four respondents in

Appeal No W–02–438 of 2000 for a voluntary winding up of the four companies. Mustapha Mohamed and Gong Wee Ning from Ms Coopers & Lybrand were duly appointed as liquidators of the four companies ('the liquidators'). Subsequent thereto by summons in chambers the liquidators applied for leave to resign from the office of liquidators of the four companies. The petitioner in the four petitions in turn applied for the removal of the liquidators. The applications by the liquidators and the petitioner in petitions No D2–28–187 of 1990, D2–28–192 of 1990, D2–28–197 of 1990 and D2–28–202 of 1990 were ordered to be heard together. The relevant order of the court is found at pp 28 to 35 of the record of appeal. On 31 May 2000 the High Court dismissed with costs both the applications by the petitioner and the liquidators.

[3] The petitioner and the liquidators were dissatisfied with the said decision of the learned trial judge and appealed against the said decision. The appeals came up for hearing before us on 24 February 2004, and at the inception Mr Wong Kian Kheong learned counsel for the first respondent in Appeal No W–02–438 of 2000 and for the appellants for Appeals No W–02–457 of 2000, W–02–458 of 2000, W–02–459 of 2000 and W–02–460 of 2000 raised a preliminary objection against the notice of appeal dated 26 June 2000 filed herein by the petitioner.

[4] The basis for the objection is contained in the letter of 18 February 2004. It is contended that no consolidation of the four petitions was ever made by to High Court. He contended that on 26 October 1996, the court had merely ordered that the removal applications made by the petitioner ('the removal applications') be heard together with the four applications filed by the liquidators for resignations ('the resignation applications'). He said the parties at the hearing of the removal applications merely agreed amongst counsel for all the parties that the decision of the removal application in the first petition will be binding on all similar applications filed in the second, third and fourth petitions. This he said is evident from the judgment of the learned judge dated 31 May 2000. In the above circumstances, he contended the petitioner ought to have filed and served four separate notices of appeal for Tien Ik Enterprises Sdn Bhd, Tien Ik Credit Sdn Bhd, Giltspur Holdings Sdn Bhd and Tien Ik Sdn Bhd ('TIESB, TICSB, GHSB and TISB') appealing against the decision of the High Court of 31 May 2000.

[5] In the result he submitted the appellant has not brought a valid appeal on behalf of TIESB, TICSB. GHSB and TISB against the said decision. In support of his submission he relied on the following:

(a) Rule 5 of the Rules of the Court of Appeal 1994;

(b) *Lee Lan v Lim Yoon Loy* [1991] 3 MLJ 419; and

(c) *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370.

[6] On 24 Febraury 2004 after hearing submissions on the preliminary objection, we adjourned the matter, to enable parties to put in written submissions. The parties have since put in their written submissions for our consideration. Having considered both the oral and written submissions we now give our decision on the preliminary objection.

[7] It is not in dispute that only one notice of appeal was filed on behalf of the petitioner which reads:

DALAM MAHKAMAH RAYUAN MALAYSIA
(BAHAGIAN RAYUAN)
RAYUAN SIVIL NO W–02–438–2000

ANTARA

WOODSVILLE SDN BHD … PERAYU

DAN

TIEN IK SDN BHD
DAVID KUOK KHOON HIN
IRENE KUOK
HELEN KUOK
BERNARD KUOK … RESPONDEN-RESPONDEN

(Dalam Perkara Mengenai Penggulungan Syarikat No D2–28–202–1990
Di Mahkamah Tinggi Malaya di Kuala Lumpur

ANTARA

WOODSVILLE SDN BHD … PEMPETISYEN

DAN

TIEN IK SDN BHD
DAVID KUOK KHOON HIN
IRENE KUOK
HELEN KUOK
BERNARD KUOK … RESPONDEN-RESPONDEN

NOTIS RAYUAN

AMBIL PERHATIAN bahawa WOODSVILLE SDN BHD, Perayu tersebut di atas tidak puas hati dengan keputusan Yang Arif Dato' Abdul Aziz bin Mohamad yang diberikan dalam Mahkamah Tinggi Kuala Lumpur pada 31 haribulan Mei 2000 merayu kepada Mahkamah Rayuan terhadap keputusan yang memerintahkan bahawa permohonan Perayu/Pempetisyen untuk melucutkan Likuidasi-Likuidasi dalam syarikat-syarikat Tien Ik Enterprises Sdn. Bhd., Tien Ik Credit Sdn Bhd, Gilspur Holdings Sdn Bhd dan Tien Ik Sdn Bhd ditolak dengan kos.

Bertarikh pada 26 Julai 2000.

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Peguamcara Bagi Perayu
Lee Ong & Kandiah.

[8] It would appear that the notice of appeal filed herein purports to be an appeal brought on the basis that the four petitions had been duly consolidated.

[9] Since there was only one notice of appeal filed the liquidators submitted that there is no valid notice of appeal filed in respect of each of the four petitions and as such this court has no appellate jurisdiction to hear the appeal.

[10] Further it is submitted for the liquidators that the notice is null and void for the following reasons:

(a) there is no court order consolidating the four (4) petitions;

(b) there is a sealed High Court order dated 26 October 1998 for merely a joint hearing not a consolidation, of the appellant's four (4) removal applications and the liquidators' four (4) resignation applications (please see Tag 6 LBA). It is to be noted that the High Court order dated 26 October 1998 was obtained in the presence of the then appellant's learned counsel, Mr Ong Chee Kwan, from Ms Lee Ong & Kandiah who are still the appellant's solicitors for the purpose of this appeal; and

(c) the sealed High Court order dated 31 May 2000 (please see Tag 8 LBA) which is the very subject matter of this appeal and which has been prepared and extracted by the appellant's solicitors, does not show any consolidation of the four (4) petitions;

(d) under s 114(e) Evidence Act 1950 (Tag A attached to the liquidators' reply) there is a rebuttable presumption that the sealed High Court orders dated 26 October 1998 and 31 May 2000 have been regularly obtained. Indeed, the appellant has neither appealed nor applied to set aside the High Court order dated 26 October 1998. As such, the High Court order dated 26 October 1998 is *res judicata* and binding on all parties, including the appellant. Similarly, the appellant has not made any application for leave to amend the sealed High Court order dated 31 May 2000 to reflect the purported consolidation of the four (4) petitions; and

(e) in any event, the appellant is estopped from denying the sealed High Court Orders dated 26 October 1998 and 31 May 2000 because of the conduct of the appellant's solicitors as explained in:

(i) paras 4, 5, 6, 8, 11(b)(e) at pp 2–3 of the liquidators first submission; and

(ii) the aforesaid sub-paras 8(b)–(d) of the liquidators' reply.

[11] Mr Lim Kian Leong learned counsel for the petitioner conceded that no order for consolidation of the four petitions has been extracted. However, he said the learned High Court judge in her grounds of judgment dated 9 June 1994 had referred to the four petitions as a consolidated petition. Further when the case went up on appeal to the Supreme Court, and the Supreme Court in its judgment had treated the first petition as being consolidated with three other petitions. He submitted that the consolidation was agreed to by all parties at the High Court and the matter went up on appeal to the Supreme Court on that premise. Further he submitted there is no specific provision for consolidation in the Winding Up Rules unlike in the High Court Rules. In any case he said since the Supreme Court had proceeded on the premise that the petitions had been duly consolidated, it is too late for the liquidators to complain at this stage.

[12] It is not in dispute that the High Court order of 26 October 1998 merely ordered that the application by the liquidators filed under Companies (Winding-up) Petition No D2–28–187 of 1990 in the High Court Kuala Lumpur to, among others, resign as liquidators of the TIESB be heard together with 11 other applications set out in the said order. The order of High Court dated 31 May 2000, which is the subject of the appeal, again does not show that the four petitions had been consolidated.

[13] The respondent, on the other hand, contended that the four petitions had been duly consolidated on the following grounds:

(1) The four winding up petitions have been consolidated as a matter of fact and of law and therefore the notice of appeal in the consolidated format is correct;

(2) The liquidators themselves have filed applications in the course of proceedings in the High Court in a consolidated format and are therefore estopped from making the preliminary objection.

(3) In view of ground 2 above the preliminary objection has been made in bad faith and is an abuse of process;

(4) Even if the preliminary objection is technically correct (which is denied), in the interest of justice and under the Rules of the High Court and the amended Court of Appeal Rules, the appeal should be allowed to proceed, as there has been no prejudice to the liquidators; and

(5) Even if the preliminary objection is allowed, it would be rendered academic because the petitioner could still proceed with the first petition and following the agreement in the winding up petitions, all the parties have agreed that they are bound by decision in the first petition.

[14] It is not in dispute that there was no express order of the court for the consolidation of the four petitions. The petitioner relies on the intitulements

of the High Court and Supreme Court judgment showing that the four petitions had been consolidated. This is further supported by the judgments of the High Court and the Supreme Court. The learned High Court judge in her judgment stated:

> In these four consolidated petitions, the parties who are the shareholders of the four companies sought to be wound up under s 218(1)(1) of the Companies Act, 1965 ('the Act'), agree as a matter of convenience to proceed with the first of such petitions files in D2–28–187–90 and that orders to be made in this first petition will govern the other petitions as well.

[15] On this same issue the Supreme Court in their judgment stated as follows:

> The four separate petitions were consolidated by consent of both parties. They agreed as a matter of convenience to proceed with the first petition in D2–28–187–90 and agreed that orders made in the first petition would bind the other petitions as well. The learned judge said so in her written judgment and these are borne out by the notes of evidence recorded by the learned judge. As it happened, the learned judge after hearing the first petition and making the orders therein made similar orders for the other petitions.
>
> We do not think the judge was wrong in this respect. The parties themselves had agreed to the procedure adopted. They cannot now complain. The parties in the four petitions are the same. The facts relied on are the same.

[16] Judging from the judgment of the Supreme Court, the issue of consolidation of the four petitions must have been raised before the court otherwise the court would not have made the finding as it did. The Supreme Court in its judgment clearly stated that it made the finding based on the notes of proceedings before the court showing that the parties had agreed to the consolidation and for that reason it was no longer open to the parties to complain about it.

[17] Learned counsel for the liquidators further submitted that intitulements to the judgments of the High Court and the Supreme Court are not part of the judgments and is not binding on this court. However, it could not be denied that the intitulements of any judgment will follow the title in the action and if two or more actions had been consolidated then the titles to the actions will state that the actions had been so consolidated

[18] On the findings by the High Court and the Supreme Court that these four petitions had been consolidated the learned counsel for the liquidators submitted that this finding is not the *ratio decidendi* in this case, but merely *obiter dicta*, therefore, they are not binding on this court. With respect to the learned counsel we do not think that is the issue before us. We are here considering whether or not the finding of the Supreme Court on the issue of consolidation of the four petitions is binding on this court. In this regard we agree with the petitioner that the Supreme Court in its judgment had clearly made a finding

on this issue and that finding, in our view, is final and binding on us. Therefore, based on that finding the four petitions must be treated as being consolidated pursuant to the order of the High Court.

[19] On the contention of the counsel for the liquidators that the sealed orders of the High Court dated 26 October 1998 and 31 May 2000 have been regularly obtained and the petitioner is therefore estopped from denying the same, we are of the view that these two orders of the High Court could not alter the order for consolidation which was made earlier. The only way for either of the parties to overcome the earlier order for consolidation is for the parties to apply to the court for a deconsolidation order. (See *Lewis v Daily Telegraph (No 2)* [1964] 2 MLJ 601 (CA).) This has not been done.

[20] Upon scrutiny of the two orders of the High Court dated 26 October 1998 and 31 May 2000, we find nothing in these two orders directing that the actions herein be deconsolidated. In the circumstances we hold that the four petitions remained consolidated and should be proceeded with as consolidated actions.

[21] For the above reasons we hold that there is no merit in the preliminary objection raised by the liquidators and we dismissed the same with costs.

Preliminary objection dismissed.

Reported by Peter Ling